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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 412.

ERVIN HOWELL AND RAYMOND EARL GUTERMUTH, *Petitioners,*

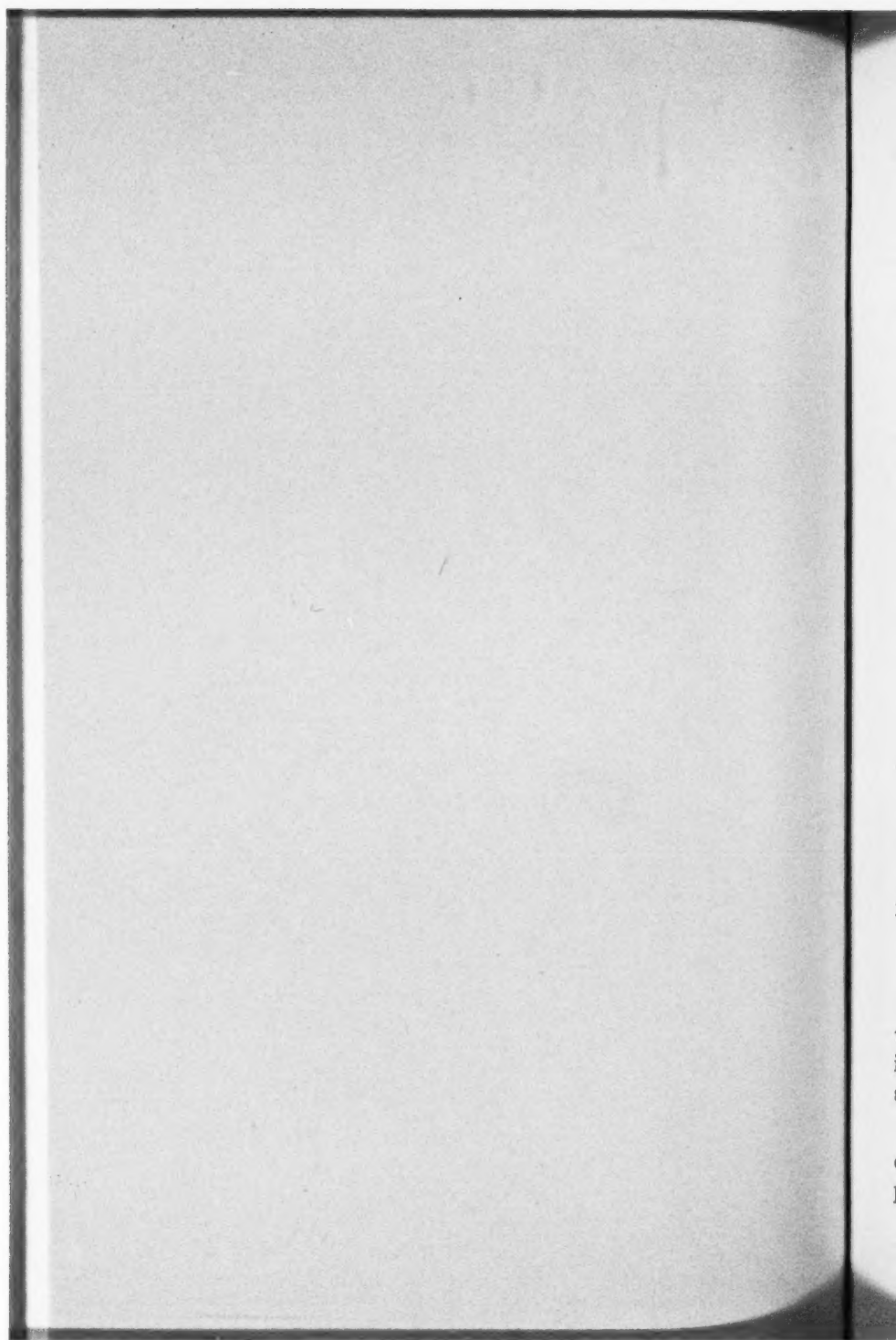
v.

ROYDEN O. COUCH, doing business as COUCH MANUFACTURING
COMPANY, *Respondent.*

**PETITION FOR REHEARING OF APPLICATION FOR
WRIT OF CERTIORARI.**

ERVIN HOWELL,
RAYMOND EARL GUTERMUTH,

By FRANCIS G. BOSWELL,
Counsel for Petitioners.



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COMPANY, *Respondent.*

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WRIT OF CERTIORARI.**

*To, the Honorable Harlan Fiske Stone, Chief Justice of the
United States and the Associate Justices of the Su-
preme Court of the United States:*

Come now Ervin Howell and Raymond Earl Gutermuth, the petitioners in the above entitled cause, and, as provided in Rule 33, present this, their petition for a rehearing of the said cause and, in support thereof, respectfully show:

1. The affidavit filed by the Respondent and printed in his opposing brief contained information which came as a surprise to the Petitioners, because the information on which

they proceeded fully justified their allegation that the specific invention is limited in use to Florida.

After denial of the petition for a writ of certiorari, the Petitioners' counsel addressed a letter to each of the manufacturers listed in the Respondent's affidavit advising each addressee of the litigation, that it was being sought to have the Supreme Court review the case, that the reverse flow expedient was thought to be peculiar to Florida, that the Respondent had given the addressee's name in a traversing affidavit, and that a drawing illustrating the construction which is the subject of the controversy was enclosed.

A print of the drawing of the Anderson model, as in the illustration opposite, was enclosed, since that gives generally the most complete information of the construction in controversy.

On the back of the drawing appeared the following questions:

"(1) Do you install your pumps in a foundation consisting of parallel walls spanned with a shelf on which the pump is mounted and which are also spanned with adjustable flashboards so that water movement can be accomplished in either direction as in the construction shown on the obverse side hereof? A.

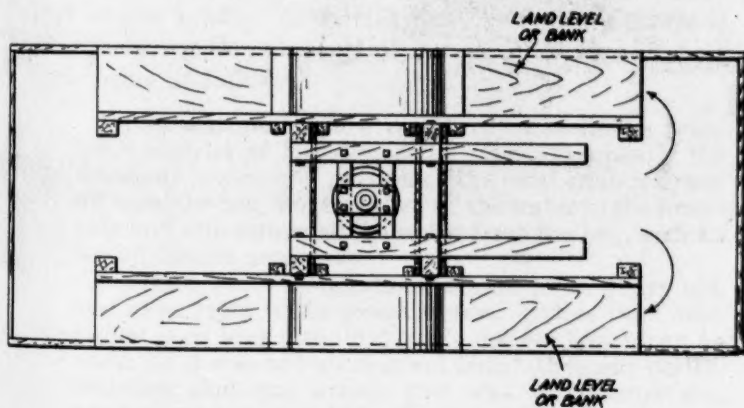
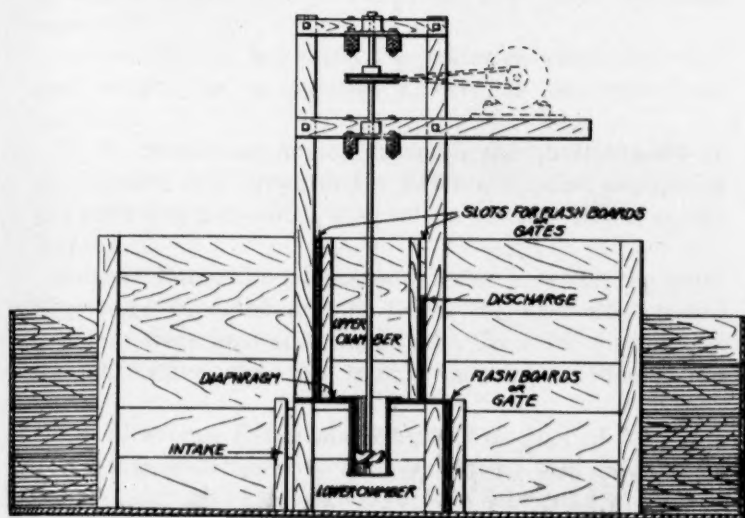
(2) Do any users of your pumps install them in such a way as to accomplish this two-way movement of the water? A.

(3) Is the expedient illustrated in the drawing used, to your knowledge, anywhere in the United States? A.

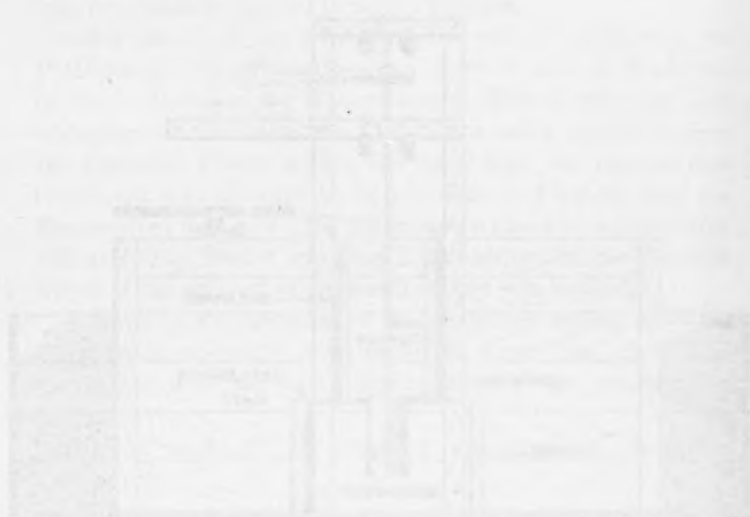
(4) If the answer to the preceding question is in the affirmative, will you please state where? A."

Replies have been received from all of the addressees except Link Belt Co., Trench and Machine Pump Co., Inc., Quimby Pump Co., Inc., and Economy Pumps, Inc. The others answered as follows:

Morris Machine Works merely replied, "No comment" written on the questionnaire.



Drawing of Defendants' Exhibit No 5



THE SCHOOL

DESIGNED BY J. H. HARRIS, ARCHT.

Byron Jackson Co., Frederick Iron and Steel Co. and F. E. Myers & Bro. Co. answered the first three questions negatively.

Goulds Pumps, Inc. replied by letter in which the statement constitutes a negative answer to the first three questions.

W. F. Stuckeman & Co. answered the questionnaire in the negative and forwarded a letter and print explaining how their pump could be used in the manner shown on the drawing.

Pomona Pump Co. addressed a letter in which the questions were repeated and in which the first and second questions were answered negatively, the third question in the affirmative and the fourth question, "Florida by Couch".

The Lawrence Pump and Engine Co., replied by letter giving a general negative answer, stating that their name was probably given through error and suggested writing to Lawrence Machine and Pump Corporation, to whom a letter had been addressed.

The Lawrence Machine and Pump Co., referred Petitioners' counsel's letter to the Hayden Cranberry Separator Manufacturing Co., who replied, the essential part of their letter being as follows:

"Two way pumps are rather common in the cranberry district of Massachusetts. Quite frequently the reservoir is simply a portion of the total swamp dyked off from the bog, and to utilize all the water in the reservoir and also return all the water from the bog, such an installation is necessary.

Some of these installations are 12 to 15 years old, and so on right to the present year. Unless the Couch patent is of long standing, we do not see how it can be valid, as it was not an original idea. It is our understanding that any article that was in common use, (meaning an open sale to the general public) for two years or more, is not patentable. Therefore, if the Couch patent is comparatively recent, it could be con-

tested on the ground that a similar installation was already in use. We have in mind such an installation by H. R. Bailey about twelve years ago. No doubt by further inquiry, we could dig up some even older. Beaton pumps have been similarly installed, and two Lawrence pumps."

The letter addressed to the Worthington Pump and Machinery Co., was referred to Rohe Meyer, patent attorney, who in his letter in reply said that the Worthington Company had sold thousands of drainage and irrigation pumps but that, except in special instances, the manner of installation was unknown. He expressed personal recollection of a truck farm in the "Delta region" of Louisiana where the owner at different periods of the year reversed the direction of flow of the water. He suggested writing to Fairbanks Morse & Co., to whom a letter had already been written and expressed his personal opinion that the reverse flow expedient was not peculiar to Florida.

The Peerless Pump division of the Food Machinery Corp., replied for the letters addressed to Kimball-Crogl and Victor Equipment Co., their letter being a general negative answer to the several questions.

Fairbanks Morse & Co., replied with a negative photostatic print of the questionnaire with questions 1 and 3 answered affirmatively, question 2 unanswered and question 4 answered, "Florida".

The Aurora Pump Co., replied by a letter in which they gave a general negative answer to the questions asked.

Allis Chalmers Manufacturing Co. replied to the letter addressed to Mills-Chalmers Co., answering questions 1, 2 and 3 in the negative and writing a letter modifying their answer to question 2 to the effect that they had accomplished two-way pumping of water between pressure tanks by use of a propeller type pump driven by a reversible electric motor.

The Respondent does not manufacture his patented invention and neither do the Petitioners. Both make only

the pump unit and the Respondent applies the patent notice to his (R. 41) although the pump unit is unpatented (R. 337 lines 12 and 13). Only when the pump is installed in a foundation which provides for the reverse flow is the invention, as it has been adjudged to be patented, produced.

The correspondence conducted as a result of the Respondent's affidavit in his opposing brief shows the alleged invention is limited in use to the State of Florida, unless the doubtful statement of the patent attorney, Meyer, and the letter of the Hayden Cranberry Separator Machinery Co., are evidence of use elsewhere. The Hayden Company's letter is probably based on a full understanding of the supposed invention and actual knowledge of its use in the cranberry district of Massachusetts. The stated length of time of such use is probably correct and so unfavorable to the Respondent that litigation instituted by him in Massachusetts is highly improbable.

The concerns listed by the Respondent in his affidavit are doubtless competitors of his as regards the pump unit but certainly are not competitors so far as the reverse flow use is concerned.

It is submitted that the Petitioners were justified in their allegation of limitation of use of the invention to Florida and that this case presents a condition within the rule applied in *Schriber-Schroth v. Cleveland Trust*, 305 U. S. 47.

The entire correspondence with the concerns mentioned in the Respondent's affidavit has been filed with the Clerk in case the Court should desire to refer thereto.

2. The validity of claim 2 was sustained in spite of doubt because, as the Circuit Court of Appeals expressed it, they were "convinced that Couch has made a practical advance by combining the things he did in his pump" (R. 338). That conclusion must have been based on the testimony of Creech and Stuckey (R. 16 to 38) and the Respondent's own testimony as to the monetary value his sales reached (R. 42). The latter is unsupported with documentary or

other evidence and the testimony of Creech and Stuckey, objected to when given and at the close of the Respondent's (Plaintiff's) case, (R. 133) was opinion testimony, uncertain in the extreme as to whether it was based on the efficiency of the pump unit or the utility of the foundation in which the unit was mounted to produce the alleged combination invention. Apparently the efficiency of the pump unit elicited their favorable expressions.

The Respondent (Plaintiff) opened his case with the testimony of Creech and Stuckey. If that testimony had any place in the trial, it was in rebuttal to the defense of invalidity.

It is submitted that such evidence as the Respondent and his two witnesses, Creech and Stuckey offered is entirely insufficient to call for the resolution of doubt of validity in the Respondent's favor.

3. The limitation in claim 2 of the patent "*a transverse diaphragm substantially intermediate the ends thereof, the opening in which communicates with the walls of said conduit*" and which also appears in claims 1 and 4 in slight variations of the form of expression in claim 2, is not susceptible of definite translation. The terms employed are not used in the specification and, in the patent, the patentee has nowhere supplied a lexicon for them. His patent attorney did, however, in the arguments made in the prosecution of the application, particularly in the amendment of November 28, 1931 (R. 275, 2nd par.) and it is contended that he is bound by his patent attorney's translation.

The Petitioners, however, know of no decision of this Court specifically on the point of how a word or expression in a claim should be construed or interpreted where the meaning is hidden or in conflict with the commonly accepted meaning and no definition is supplied by the patentee.

While the Circuit Court of Appeals held claims 1 and 4 not to be infringed and were right in this respect, the rea-

sons given were illogical, being based on a misapplication of the doctrine of equivalents.

The Court of Appeals held that "guides extended above said diaphragm" (R. 338, 3rd par.) is a limitation to which the guide grooves in the concrete walls of the Petitioners' construction (R. 298) do not respond. Yet there is no functional difference in them and barely any structural difference. On the other hand the Appellate Court held that the flashboards of the Petitioners and the vertically adjustable gates of the patent claims are equivalents when the only thing they have in common is independent adjustability and when the flashboards have advantages not possible with the gates of the patent, as for example, the automatic return of excess water in case of light rains, predetermination of the water table etc. (R. 40, last 7 lines).

It is submitted that in this case there has been a total failure to make the proper application of the rule of equivalents which can only be rectified, under all the conditions that obtain, by this Court assuming jurisdiction.

4. With respect to the Anderson testimony, that was characterized as vague and inconclusive. A rigid rule was applied for gauging its probative force, but an exceedingly liberal one obtained in appraising the Respondent's testimony. He was given a date of disclosure in the early summer of 1929 (R. 183) on testimony given in rebuttal after he had heard Anderson (R. 177), when on direct examination he fixed the time of the drawing and design of the first pump as in the "latter part of 1929 or early 1930" (R. 34).

Cross examination of Anderson was not on the essentials of his testimony. It sought only to make something out of the fact that he could not fix the date of the making of the model which was previous to the installation at Primola Farms; and was an abortive attempt to make him admit that the model was a "one-way" pump.

It is submitted that, on the Anderson testimony alone, judgment should have been for the Petitioners.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that the writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit applied for be awarded, and that the judgment of the said Circuit Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

FRANCIS G. BOSWELL,
Denrike Building,
Washington, D. C.,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Francis G. Boswell, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing in this cause is presented in good faith and not for delay.

FRANCIS G. BOSWELL.

ACKNOWLEDGMENT OF SERVICE.

Service acknowledged this day of November, 1942.

CHARLES R. FENWICK,
Counsel for Respondent.

